VASU DEVAN T.K. NAIR & ORS.

v.

VELU ACHUTHAN NAIR

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
GEORGE SEAH FJ
MOHD. AZMI FJ
[CIVIL APPEAL NO. 5 OF 1981]
9 JUNE 1984

CONTRACT: *Partnership - Agreement of sale of partnership business - Whether tainted by fraud - Whether made in good faith - Finding of fact by trial Judge - Whether could be disturbed - Delay regarding complaint against agreement - Effect - Purchasers of business - Whether bona fide purchasers for value - Sections 7, 8 Partnership Act - Whether applicable.*

APPEAL: *Finding of facts by trial Judge - Whether against weight of evidence.*

AGENCY: *Sale of partnership business - Whether binding - Whether one partner agent for another - Sections 7, 8 Partnership Act - Whether applicable.*

By a deed of partnership, a printing firm under the style of Perchetakan Kota was formed by the 1st and 2nd appellants (Mr. Devan and Madam Das) and the respondent (Mr. Nair). The respondent was the tenant of premises which were used by the business, which operated under the printing licence issued to the 1st appellant. When the business did not prosper as anticipated, it was sold to the 3rd appellant, Jothi Printers, which was formed by three persons who were interested in purchasing the business. The 1st appellant was made a director of the company.

The respondent was dissatisfied with the sale and wrote a letter of complaint to the 1st and 2nd appellants. He then sued the appellants. He claimed that all the time the negotiations were proceeding he had thought that the business would be bought over by the three interested persons and that he became aware of the formation of Jothi Printers as the actual purchaser with the 1st appellant as a director only later, after the business had been taken over by the three interested persons. The trial Judge gave judgment for the respondent. The appellants appealed.

Held:

[1] There was sufficient evidence for the trial Judge to have come to the conclusion he did on the facts.

[2] The sale agreement to the 3rd appellant was tainted with fraud.

[3] The delay by the respondent in making his written complaint did not displace the preponderance of evidence against the appellants that the sale agreement was tainted with fraud or at least with absence of good faith on the matter of directorship. The utmost good faith is due from every member of a partnership towards every other member and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.

[4] The sale agreement was null and void and of no effect against the partnership which was still subsisting. The 3rd appellant had no right or interest in either the printing business or in respect of the said premises. The 1st appellant was not acting as an agent of the partnership but as a principal regarding the sale agreement and therefore his act could not be imputed to the partnership. Sections 7 and 8 of the Partnership Act 1961 did not apply. (*British Homes Assurance Corporation v. Paterson* [1902] 2 Ch. 404).

[5] Whether the tenancy of the business premises had become partnership property or not was a question of fact. (*Ashworth v. Mann* [1818] 15 Ch. 363 @ 369; *Gian Singh & Co. v. Devraj Nahar & Ors.* [1965] 2 MLJ 12; *N. B. Menon v. Abdullah Kutty* [1974] 2 MLJ 159).

[Appeal dismissed with costs.]

Cases referred to:
Blisset v. Daniel [1853] 10 Hare. 522
Cassels Stewart [1881] App. Cas. 64
Trimble v. Goldberg [1906] AC 494
British Homes Assurance Corporation v. Paterson [1902] 2 ch. 404
Ashworth v. Mann [1818] 15 ch. 363
Gian Singh & Co. v. Devraj Nahor & Ors. [1965] 2 MLJ 12
N. B. Menon v. Abdullah Kutty [1974] 2 MLJ 159
Dale v. Hamilton [1846] 5 Ha. 393

Legislation referred to:
Partnership Act 1961, ss. 7 & 8

Other source referred to:
Partnership, Lindley 13th Edn. @ 113

For the 2nd & 3rd appellants - Subra Naicker; M/s. Subra Naicker & Co.
For the respondent - Elyas Majeed; M/s. Elyas Majeed & Co.

JUDGMENT

Mohd. Azmi FJ:

By a Deed of Partnership dated 6 April 1972, a printing firm under the style of Perchetakan Kota was formed by Mr. Nair (the plaintiff), Mr. Devan (1st defendant) and Mr. Devan's sister-in-law, Madam Das (2nd defendant). Of the three partners, only Mr. Nair had experience and knowledge of the printing industry, but unlike Mr. Devan and Madam Das, he had no financial resources. However, Mr. Nair had the tenancy of premises No. 7 Jalan Mas, Coronation Park, Johore Bahru, which was suitable to house a printing press. As for Mr. Devan, apart from being financially sound, he also had a printing press licence issued in his name by the Ministry of Home Affairs on 28 September 1971 (see R154). How he managed to get such a valuable licence is, of course, not our concern, but it is a fair inference that Mr. Devan needed a person like Mr. Nair to utilize the licence profitably. Although there was an attempt to advance the argument that before the partnership was formed Mr. Devan was already the sole proprietor of Perchetakan Kota, obviously being the sole owner from 1 August 1971, the date on which the business was supposed to have commenced, did not contribute anything to his knowledge of the printing industry. It would seem to us that the registration of Perchetakan Kota on 8 September 1971 under the Registration of Businesses Ordinance 1956 was to facilitate the formation of the partnership. Otherwise, premises No. 7

Jalan Mas of which Mr. Nair was the tenant would not have been given by Mr. Devan as the principal place of the printing business (see R72). The fact that Mr. Nair's skill was required for Perchetakan Kota is reflected in para. 3 of Mr. Devan's affidavit sworn on 31 July 1978 in which he admitted that, "in fact it was at the suggestion of Velu Achuthan Nair, the respondent/plaintiff herein that I originally agreed to enter into the printing press business. I myself had no personal knowledge of the printing industry. On the other hand, to my knowledge, the said respondent/plaintiff had some experience therein." Clause 1 of the partnership agreement which provides, "The partnership business (hereinafter referred to as 'the partnership') shall be carried on under the name of "PERCHETAKAN KOTA" at 7, Jalan Mas, Coronation Park, Johore Bahru as per registration under the Registration of Businesses Ordinance 1956 bearing Certificate No. 262917" (see R19) also showed that the business registration in Mr. Devan's sole name in September 1971 was apparently to secure the approval of the printing licence in his name. The licence was in fact approved and issued in the same month and followed by the formation of the partnership in April 1972. As observed by Vice-Chancellor Wigram in *Dale v. Hamilton* [1846] 5 Ha. 393:

> if one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the Court to measure the quantum of value. The parties must decide that for themselves.
> (see Lindley on *Partnership* 13th Edn. @ 113).

Thus, it was these circumstances that the three persons pooled their resources together namely, Mr. Nair (PW1) with his skill in printing industry together with the tenancy of business at No. 7 Jalan Mas, and Mr. Devan (DW1) with his printing licence and together with his sister-in-law, with their money. That was how they came together to form the partnership of 6 April 1972 although it must be noted that Madam Das (DW8) was the least dominant partner as her role was in fact played by her husband Dr. Das (DW2). She was the nominee of her husband who was the brother of Mr. Devan. The question of value that each partner contributed to the partnership business was reflected in the partnership agreement (R19). In the second preamble it was agreed, "that they shall be and become partners in the printing business". The scope of the partnership was therefore to run a printing business under the name of Perchetakan Kota by using the printing licence issued under Mr. Devan's name at No. 7, Jalan Mas, Johore Bahru of which Mr. Nair was the tenant. By Clause 4 and 5 it was also agreed that the capital of the partnership should be RM30,000 to be contributed by Mr. Devan and his sister-in-law Madam Das in equal shares and that there should be no monetary contribution by Mr. Nair to the capital of the partnership, but the printing business should be under Mr. Nair's exclusive and complete management. In consideration of such services, Mr. Nair was entitled: (i) to hold 10% of the business stock, (ii) to receive 10% of the profits, and (iii) to draw out of the partnership business RM200 per month for his own use. Within 18 months of the agreement, he was also entitled to buy 20% of the stock. As it turned out, the skill and ability of Mr. Nair were not enough to make Perchetakan Kota a flourshing business as anticipated by the three partners, with the result that Mr. Nair was never able to buy the 20% stock in which he was entitled. The second-hand printing machine and accessories bought by the partnership began to cause problems and sapped the vigour of the business. By 1978, the performance of Perchetakan Kota became so discouraging and despairing that the partners were prepared to call it a day by disposing

of the partnership business. But none of the partners took any step to terminate the partnership as provided by Clauses 2, 16 and 17 of the 1972 agreement. Under Clause 17, the partnership might be determined by any partner in respect of himself or herself by such partner giving to the other partner three months' notice in writing. Indeed in para. 5 of the Statement of Defence of all the appellants/defendants, it was denied "that there was any termination of the partnership", a position not at variance with the declaration sought in Mr. Nair's first prayer under para. 15 of the Statement of Claim. Instead, they looked round for a possible buyer of Perchetakan Kota including advertising in newspapers. In 1978, they discovered the promoters of third defendant Company (Jothi Printers) who became interested in taking over the printing business. Perchetakan Kota was originally offered for sale at RM70,000 with its goodwill. The interested purchasers consisting of Mr.Arumugam, Mr.P.Siwalingam, and Mr.R.Sinniah (DW4), counter-offered at RM30,000 on account that the printing machinery and accessories were already quite old but it was turned down by the partners at the first meeting on 8 February 1978 at Kulai International Club. On 2 March the same year the counter-offer of RM30,000 was increased by the interested parties to RM38,000 with a proposal that instead of buying Perchetakan Kota directly, they would form a limited company to buy over the printing business and give a directorship to Mr. Devan in the said company. According to Mr. Devan and the other two appellants/defendants the new counter-offer was accepted by all the three partners at the meeting held on 2 March 1978 at premises No. 7, Jalan Mas, Johore Bahru at about 3.00 p.m. Mr. Nair, however, vehemently denied that all the basic terms of the new counter-offer were ever discussed and agreed to at the second negotiation held at Johore Bahru. His contention was that the partners had agreed to sell the printing business at RM55,000 and not at RM38,000, and that there was no mention during the second negotiation of the intention of the interested parties to form a company to buy over the business and to make Mr. Devan a director as part of the consideration for the sale and purchase agreement. Mr. Nair therefore claimed that the take-over by Jothi Printers was tainted with fraud, the particulars of which were set out in para. 10 of his Statement of Claim. All along Mr. Nair thought that the partnership business would be bought over by the three interested parties and he became aware of the formation of Jothi Printers as the actual purchaser with Mr. Devan as a director only in May 1978, after the interested parties had taken over the printing press from 1 April that year. On realising the true nature of the sale transaction in May 1978, Mr. Nair wrote an undated letter of complaint to Mr. Devan and Madam Das (see R220). On 16 May 1978, Mr. Nair served a notice on Jothi Printers to vacate premises No. 7, Jalan Mas. When Jothi Printers refused to comply, Mr. Nair sued Mr. Devan, Madam Das and Jothi Printers for: (i) a declaration that the partnership constituted by the 1972 partnership deed was still subsisting, (ii) an order that the sale of the partnership business to Jothi Printers was null and void and that the company had no right or interest in the printing business at premises No. 7, Jalan Mas or in respect of the premises itself, and (iii) an injunction to restrain the company from entering the premises or carrying on any printing business therein. On the pleadings, the take-over of the printing business at No. 7, Jalan Mas by Jothi Printers was admitted, but it was averred by para. 15 of the Statement of Defence of all the three defendants that the sale transaction was carried out with the full knowledge and consent of all the three partners including Mr. Nair. So was the transfer of the tenancy of the premises to the company with effect from 1 April 1978. In fact, it was the defence contention that the whole idea to dispose of the printing business of the partnership came from Mr. Nair himself in order to cut down losses suffered by Perchetakan Kota as a result of Mr. Nair's mismanagement of the partnership business. According to para. 16 of

the Defence it was averred that Mr. Nair's real grievance was that his share of the net balance from the purchase price received from Jothi Printers had not been apportioned and distributed to him. The balance of the purchase price was admittedly still kept by Mr. Devan. As to Mr. Nair's complaint that he should have been given option to purchase the partnership share in accordance with the agreement, the Defence's answer under para. 5 was a denial that there was any termination of the partnership or that he had become entitled to any option to purchase. By Order-in-Chambers dated 16 July 1978, Anuar J issued an interim injunction restraining Jothi Printers (the 3rd defendant/purchaser) from entering the disputed premises and carrying on any printing business therein. Jothi Printers' application to have the injunction set aside *vide* Summons-in-Chambers dated 10 August 1978 was dismissed with costs by the learned Judge on 23 August the same year. The three defendants then applied for an early date of trial as the existence of the injunction had brought the entire printing business to a complete halt. The application was allowed by the learned Judge and the hearing commenced on 21 November 1978. As a result of Mr. Devan's death before this appeal was heard his window, Madam Tara Rajaratnam as administratix of his Estate was given the opportunity to be joined as a party to the appeal. She had however written in stating that she did not consent to be joined in the proceedings. At the commencement of this hearing, we therefore allowed the application of Madam Das for an order that the appeal be heard and determined notwithstanding Madam Tara's refusal to take the place of the late Mr. Devan.

There were three principal issues canvassed both here and in the Court below. The first was an issue of fact as to whether Mr. Nair did agree to the sale of the printing business to Jothi Printers at RM38,000. The second issue was whether tenancy of No. 7, Jalan Mas vested in Mr. Nair for his benefit only or for the benefit of Perchetakan Kota. The third issue was whether Jothi Printers were *bona fide* purchasers for value. The learned Judge's findings on the first and third issues were as follows:

First issue

> There were discussions over the sale of Percetakan Kota in which initially the plaintiff also took part. However in the final stages of the negotiation the plaintiff was left out and did not take part in the discussions. During the time when the plaintiff participated in the negotiation he had agreed for the sale of the printing press business at RM55,000. He did not consent to the sale of the business at RM38,000. The sale of the business at RM38,000 was reached between the First Defendant and the Third Defendant. Obviously, the First Defendant had concluded the sale agreement with the Third defendant without the plaintiff's knowledge or consent. Had the plaintiff been informed of the final purchase price the plaintiff would not have agreed to it.

Third issue

> The appointment of the first Defendant as a director of the third Defendant's company which purchased the Percetakan Kota clearly came as a surprise. It is surprising that only the first Defendant was made a director of the Company and not the Plaintiff as well. The third Defendant's reason is that the first Defendant had the licence for the printing press and therefore he should be made a director to facilitate the transfer of the licence to the new company. I cannot accept this explanation. I think the first Defendant was made a director as a consideration of the sale of the printing press business. This must have been the reason why this fact was not made known to the plaintiff.

The principle upon which this Court would disturb findings of fact is well established. The Judge's findings were attacked on the ground that they were against the weight of evidence. It was unfortunate that the learned Judge did not go into greater detail on the first issue as to why he found it obvious that Mr. Devan had concluded the sale agreement of 20 March 1968 with Jothi Printers without Mr. Nair's knowledge or consent. In our view in determining whether the sale of the partnership business to Jothi Partners is voidable, the first issue is inextricably intertwined with the third issue, and on the evidence in the appeal record, we are satisfied on balance, that there was sufficient material for the learned Judge to come to the conclusions that he did and to allow the prayers sought by Mr. Nair. There was voluminous evidence both on affidavit and oral testimony before the learned Judge pertaining to the first and third issues and although he merely glossed over them, we are of the view that there was reliable evidence that the sale agreement disposing of the partnership business by Mr. Devan to Jothi Printers was tainted with fraud and that Jothi Printers were not *bona fide* purchasers for value without knowledge of the partnership. In our view there was sufficient evidence on record to show that Mr. Nair was kept in the dark as to the real nature of the new counter proposal made by Mr. Arumugam, Mr. Siwalingam and Mr. Sinniah. Para. 22 of Mr. Devan's affidavit affirmed on 31 July 1978 (R49) asserted in no uncertain term that, "Then on the morning of 2 March 1978 or thereabouts R. Sinniah, P.K. Paliksina Siwalingam and A. Nadarajah met me and proposed that instead of completely buying off the business, a private limited liability company be formed to take over the business, that I become one of the directors of the proposed company and that they would pay me a sum of RM38,000 by way of purchase price of the machinery and accessories of the press and which money I could use to settle the past and accrued debts of Percetakan Kota and the balance, if any, be apportioned between the three of us after the taking of the accounts of the firm in due course. It was also agreed that the three of us would meet the interested parties at 3.00 p.m. on the same day at the premises of the Percetakan Kota to finalise matters." Paragraph 23 then mentioned by name all those present at the 3.00 p.m. meeting. This was followed by para. 24 which set out the terms of the sale as agreed at that meeting. Although the presence of Mr. Nair at the second meeting at Johore Bahru was supported by the affidavit evidence of Mr. Nadarajah (R36), Mr. Siwalingam (R44), Mr. Sinniah (R65) and Dr. Das (R39), there was nothing in their evidence to show that Mr. Nair knew of the basic terms of the new counter proposal as contained in the sale agreement and in para. 22 of Mr. Devan's affidavit particularly regarding the proposal to form a limited company to take over the partnership business and the appointment of Mr. Devan as a director in a company to be formed. In fact there was nothing in para. 24 of Mr. Devan's affidavit to indicate that the question of his directorship in the take over company was discussed and agreed to by the parties. The new counter proposal by the purchasers changed drastically the nature of the transaction as originally envisaged by the parties. Notwithstanding such drastic change, in the evidence of Mr. Devan and the other witness for the appellants, it seemed to be suggested that the question of directorship of Mr. Devan only came subsequently as a consequential matter to facilitate the use of the printing licence by Jothi Printers and not as a basic part of a new counter offer as contained in para. 22 of Mr. Devan's affidavit. Having regard to the importance of the printing licence without which neither Perchetakan Kota nor Jothi Printers could operate, we cannot agree that the question of directorship was a mere consequential matter. It was deliberately suppressed from Mr. Nair's knowledge by the appellants.

It was the submission of Mr. S. Naicker, Counsel for Madam Das and Jothi Printers that Mr. Nair should not be believed as he gave four versions of what really happened during the two negotiations for the sale of the partnership business. We have considered all the evidence and we are of the view that although there might be some inconsistencies in his evidence, the alleged four versions were not sufficient to justify us in substituting the Judge's findings particularly on the issue that the sale agreement in its present form was concluded without Mr. Nair's knowledge or consent. There could be no doubt that two important negotiations were held between the partners and the interested parties. As far as Mr. Nair was concerned, we agree with the learned Judge that there was no knowledge or consent on his part in the sense that the real nature of the sale agreement particularly regarding the appointment of Mr. Devan as a director of the said company was unfairly hidden from him. It was Jothi Partners' case that all along they were led to believe by Mr. Devan that he was a sole proprietor of Perchetakan Kota on the basis of the business registration (R72); that they were completely unaware of the partnership agreement, and that none of the partners including Mr. Nair had disclosed to them during the sale negotiations that they were dealing with partners. Having regard to the evidence, we do not think that the claim by Jothi Printers that they did not know about the partnership could be sustained. The affidavits of Mr. Nadarajah, Mr. Siwalingam and Mr. Sinniah - the moving spirit behind the take-over, do not support such a situation. Indeed from the affidavit of Mr. Devan (R49) particularly para. 20 (R53), Mr. Nair took a very active part in the first negotiation at Kulai International Club on 7 February 1978. The first counter offer of RM30,000 by the interested trio was turned down not only by Mr. Devan but also by Mr. Nair. By inference, para. 22 of the affidavit showed that on the morning of 2 March 1978, it was agreed between Mr. Devan and the interested trio that the trio would meet "the three of us" on the same day "to finalise matters". If the trio (the promoters of Jothi Printers) thought that they were dealing with a sole proprietorship in the person of Mr. Devan and not with partners, then they could have concluded the transaction there and then on the morning of 2 March 1978 itself, without having to finalise the new proposal with Mr. Nair and Dr. Das. Indeed, the active participation of Mr. Nair during the negotiations ought to have put them on enquiry as to his status in Perchetakan Kota. We are therefore satisfied that Jothi Printers knew all along about the partnership and they in fact entered into the sale agreement with Mr. Devan on 20 March 1978 (R228) knowing fully well that Mr. Nair was kept ignorant of the secret benefit to be given to Mr. Devan. Indeed a copy of the sale agreement was only supplied to Mr. Nair after relation between the parties had become strained. In our view the particulars of fraud as contained in para. 10(a) and (f) of the Statement of Claim had been proved. The agreement was indeed tainted with fraud as far as the partnership was concerned.

The only matter not properly explained by Mr. Nair was on the question of delay of about two months in making his written complaint to his two co-partners *vide* undated letter R220. The undated letter was sent in May 1978, yet in para. 11 of Mr. Nair's affidavit (R15) he affirmed that he knew of the sale of the business at RM38,000 to Jothi Printers in March 1978. If so why the delay of two months before making a complaint? In our view this delay could not displace the preponderance of evidence against the appellants/defendants that the sale agreement was tainted with fraud or at least with absence of good faith on the matter of directorship. Lindley on *Partnership,* 13th Edn. from pp. 335 to 338 shows that the utmost good faith is due from every member of a partnership towards every other member and if

any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour (see *Blisset v. Daniel* [1853] 10 Hare 522, 536; *Cassels v. Stewart* [1881] App. Cas. 64 and *Trimble v. Goldberg* [1906] AC 494). Good faith is especially required to be observed when one partner is endeavouring to get rid of another or to buy him out. Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership to do his best for the common body and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate. In this appeal, although the secret benefit that Mr. Devan had obtained for himself was not in the form of direct monetary gain, he had obtained surreptitiously the position of a director in the take-over company without the knowledge and consent of Mr. Nair. Despite the appellants' denial, the directorship was clearly part of the consideration of the sale of the partnership business. This is self evident from the sale agreement which was not made available to Mr. Nair until legal action was threatened. By obtaining the secret benefit, Mr. Devan had not acted in the utmost good faith towards his co-partners particularly to Mr. Nair.

Now what is the position of Jothi Printers? As stated earlier, their stand is that the sale should not be annulled as they were *bona fide* purchasers for value. Under s. 7 of Partnership Act, 1961, every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Section 8 also provides that an act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners; provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments. Thus, if a person did not act in his capacity as an agent but as principal on his own account, his act cannot be imputed to the firm and he alone is liable for them even though the firm may have benefited by them (see *British Homes Assurance Corporation v. Paterson* [1902] 2 Ch. 404). In this appeal, having regard to its contents, the sale agreement of 20 March 1978 was entered by Mr. Devan with Mr. Siwalingam in his capacity as a principal and sole proprietor of Perchetakan Kota and not as an agent. As such Mr. Devan's act could not be imputed to the partnership. This is consistent with the fact that the purchase money of RM38,000 was never paid to the partnership account. Clearly in law, Jothi Printers of which Mr. Siwalingam was a founder director, could not enforce the agreement against the partnership. The agreement is not binding on the firm and nor was Mr. Nair bound by it as a partner. In the circumstances the learned Judge was correct in giving judgment for Mr. Nair as prayed. The sale agreement purporting to dispose of the partnership business at RM38,000 is null and void and of no effect against the partnership which is still subsisting. It therefore follows that Jothi Printers have no right or interest in either the printing business at No. 7, Jalan Mas or in respect of the said premises.

In view of our conclusion, it is unnecessary to deal with the second issue as to whether the tenancy of No. 7, Jalan Mas vested in Mr. Nair for his benefit only or for the benefit of the partnership. Whether the tenancy of the business premises had become partnership property or not is a question of fact (see *Ashworth v, Mann* [1818] 15 Ch. 363; *Gian Singh & Co. v. Devraj Nahar & Ors.* [1965] 2 MLJ 12; and *N.B. Menon v. Abdullah Kutty* [1974] 2 MLJ 159).

For reasons that we have given, this appeal must be dismissed with costs.

Also found at [1985] 1 CLJ 160